

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

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State of Oklahoma, et al.,	)	05-CV-0329 GKF-SAJ
	)	
Plaintiffs,	)	
	)	
v.	)	<b>THE CARGILL DEFENDANTS’</b>
	)	<b>SUPPLEMENTAL BRIEFING IN</b>
Tyson Foods, Inc., et al.,	)	<b>SUPPORT OF SANCTIONS FOR</b>
	)	<b>PLAINTIFFS’ ABUSE OF RULE 33(D)</b>
Defendants.	)	
	)	

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Cargill, Inc. (“Cargill”) and Cargill Turkey Production, LLC (“CTP”) (together, the “Cargill Defendants”) at the invitation of the Court submit this post-hearing memorandum in support of their request for sanctions against Plaintiffs for their failure to abide by this Court’s discovery Orders and related abuse of Federal Rule of Civil Procedure 33(d).

This Court’s Order of May 17, 2007 (Docket No. 1150) addressed a motion to compel discovery brought by the Cargill Defendants on February 14, 2007 (Docket No. 1054). Among other complaints, the Cargill Defendants objected to Plaintiffs’ failure to specify which documents were responsive to the interrogatories answered with Rule 33(d) designations. In the Order, the Court memorialized Plaintiffs’ agreement to supplement such interrogatory responses with more particular designations in line with prior Orders of the Court. (Docket No. 1150 at 2, referencing prior Orders at Docket Nos. 1061, 1118.)

According to Plaintiffs’ original interrogatory responses – executed under oath – Plaintiffs have information and documents responsive to each interrogatory answered under Rule 33(d). Nonetheless, in response to the Order of May 17, Plaintiffs unilaterally withdrew their Rule 33(d) designations to Cargill Interrogatory Nos. 3 and 16 and CTP Interrogatory Nos. 6, 13, and 15, but provided nothing in their place but vague reservations for potential supplementation.

In choosing to retract information instead of supplementing their responses with information Plaintiffs swore that they have, Plaintiffs violated the Federal Rules and this Court's Orders. After futile attempts to meet and confer about Plaintiffs' noncompliance with the May 17, 2007 Order, the Cargill Defendants moved for sanctions on August 28, 2007. (Docket No. 1252.) Chief among the Cargill Defendants' protests was the failed "supplementation" of Plaintiffs' Rule 33(d) responses to Cargill Interrogatories Nos. 3 and 16 and CTP Interrogatories 6, 13, and 15.

This Court heard oral argument on the sanctions motion on September 27, 2007. While speaking to the Rule 33(d) designation issue, Plaintiffs' counsel "confess[ed]" that Plaintiffs had "overused" the option to produce documents in originally responding to the Cargill Defendants' interrogatories. (Sept. 27, 2007 Hrg. Tr.: Docket No. 1317 at 39; see also id. at 52: "We over designated 33(d) in the beginning and we just removed those designations."; accord id. at 64.) In light of this admission, the Court invited the Cargill Defendants to submit additional briefing regarding an appropriate sanction. (Id. at 65.)

On October 17, 2007, the Cargill Defendants informed that Court that they were continuing to meet and confer with Plaintiffs in an attempt to obviate the need for Court-imposed sanctions for Plaintiffs' discovery violations, and requested time to complete such conferences before filing their post-hearing Rule 33(d) sanctions brief. (Dkt. No. 1324.) The Court holds that request in abeyance. (Dkt. No. 1375 at 5: Order of Nov. 14, 2007.) The parties held their last meeting and conference on this issue on November 29, 2007, and were unable to reach agreement. The Cargill Defendants therefore provide the Court with their suggested sanctions.

### **I. The Cargill Defendants Should Receive a Monetary Award.**

Federal Rule of Civil Procedure 37(b)(2) permits the Court to require Plaintiffs to pay the Cargill Defendants' reasonable expenses, including attorney's fees, caused by their failure to abide by this Court's Orders. Plaintiffs not only improperly claimed Rule 33(d) designations, but also failed until the hearing on the motion for sanctions to assert that none of the documents designated were actually responsive. Because the case presents no circumstances would make an award of costs and fees unjust, this Court is bound to sanction Plaintiffs. Fed. R. Civ. P. 37(b); see also Fed. R. Civ. Pro. 37(a)(4)(A).

Although Plaintiffs' behavior warrants some sanction, the Cargill Defendants have no desire to impose the burden of a large monetary sanction on the treasury of the State of Oklahoma. The Cargill Defendants request that the Court award them sanctions in the nominal amount of \$1000, an amount obviously far below the Cargill Defendants' actual expenditures in reviewing the falsely designated documents and in brining and arguing the motion that forced the Plaintiffs' "confession."<sup>1</sup> See, e.g., Lillie v. United States, 40 F.3d 1105, 1110 (10th Cir. 1994) (upholding discretionary decision of Northern District of Oklahoma to award nominal sanction for Rule 26(g) violation). In light of Plaintiffs' admitted violation of Rule 33(d) and their violation of this Court's Orders, a nominal sanction of \$1000 is reasonable.

### **II. The Court Should Order Plaintiffs to Submit to a 30(b)(6) Deposition Regarding Verification of the Original Interrogatory Responses.**

A monetary sanction alone, however, will not make the Cargill Defendants whole or entirely cure the damage caused by Plaintiffs' now-withdrawn Rule 33(d) designations. The

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<sup>1</sup> Because the Cargill Defendants do not seek all of these attorney's fees and costs, they have not submitted to the Court any affidavits demonstrating the substantial attorneys' fees and expenses actually incurred in these efforts. If the Court would find such information useful, the Cargill Defendants will of course promptly provide such records.

Cargill Defendants also ask the Court to direct Plaintiffs to produce for a 30(b)(6) deposition the person or persons most knowledgeable about Plaintiffs' now-disavowed verification of the accuracy of their interrogatory responses. The Cargill Defendants are entitled to find out (1) why Plaintiffs originally averred that the Rule 33(d) designations for Cargill Interrogatories 5, 6, 7, 8, 13, 15, and 16 and CTP Interrogatories 2, 3, 4, 6, and 16, were appropriate, and (2) why Plaintiffs now try to abandon that factual representation. Such topics would be the proper subject of a Rule 30(b)(6) notice under the Rules in any event, and the Cargill Defendants would ordinarily simply note the deposition and go forward. Inasmuch as Plaintiffs here have already indicated that they would object to such a deposition notice, however, the Cargill Defendants believe that the Court can best consider the propriety of the deposition in the context of the Plaintiffs' conduct that made the deposition necessary.

Depositions are a common and wholly permissible method to explore an opposing party's knowledge and positions, including statements a party has made in response to interrogatories. As prominent commentators have observed:

[D]epositions are preferable if a searching interrogation of the other party is desired. At a deposition the examining party has great flexibility and can frame the questions on the basis of answers to previous questions. Moreover, the party being examined does not have the opportunity to study the questions in advance and to consult with counsel before answering, as is the case if interrogatories are used. Attempts at evasion, which might be stymied by a persistent oral examination, cannot easily be countered by interrogatories. The flexibility and the potency of oral depositions is in large part lacking in written interrogatories. It is for these reasons that depositions are, in federal court at least, by far the most widely used of the discovery devices. Particularly in this era of word processors, interrogatories can readily be misused or employed in such a rote manner as almost to ensure unhelpful answers.

8A Wright & Miller, Federal Practice & Procedure, Civil §2163 (emphasis added, footnotes omitted). In addition, "[a]n attempt may...be made to secure damaging admissions by taking the deposition of a party whose answers to interrogatories are disingenuous or lacking in candor.

The replies to interrogatories may be used for purposes of impeachment if the oral examination leads to contradiction.” Id.

Here, the Cargill Defendants require a 30(b)(6) deposition to explore and cut through Plaintiffs’ playing word games with written discovery. For example, despite this Court’s detailed Order of May 17, Plaintiffs would not admit that they in fact have no direct evidence of wrongdoing by the Cargill Defendants until their response to the Cargill Defendants’ motion seeking sanctions for Plaintiffs’ failure to provide just that information. Similarly, on the Rule 33(d) issue, Plaintiffs have only asserted the conclusion that they “overused” the discovery response tool. (Docket No. 1317 at 39.) Plaintiffs have never offered the Court or the Cargill Defendants an explanation for why or how they verified the erroneous designation of numerous documents under Rule 33(d). (See id. at 64.) To the contrary, Plaintiffs previously averred to the Court that those specific Rule 33(d) designations were entirely proper. (See Pls.’ Resp. Opp’n Cargill Defs.’ Mot. Compel: Docket No. 1086 at 8, 9, 10, 13.) At the April 27, 2007 hearing on the Cargill Defendants’ motion to compel, counsel for Plaintiffs relatedly represented that they would produce responsive documents “to the extent there are outstanding [Rule 33(d)] interrogatories.” (Docket No. 1144 at 91.) As this Court noted at the September 27th hearing, Plaintiffs first “said it was there and not you’re saying it’s not.” (Docket No. 1317 at 64.)

At present, the record here contains two contradictory representations: a sworn representation by Plaintiffs that the evidence supporting many of Plaintiffs’ contentions against the Cargill Defendants may be gleaned from documents Plaintiffs have produced, [citation], and an in-court representation by Plaintiffs’ attorneys that those documents do not in fact contain that evidence. [citation to transcript] Both of these statements cannot be true. Either:

- Plaintiffs' attorneys are mistaken, Plaintiffs' original sworn answers are accurate, and the documents do contain evidence responsive to the Cargill Defendants' interrogatories; or
- Plaintiffs' attorneys are correct, Plaintiffs' original sworn answers are false, and the documents do not contain any evidence responsive to the Cargill Defendants' interrogatories.

In either event, the Cargill Defendants are entitled to a 30(b)(6) deposition to address the issue. The Cargill Defendants assume that Plaintiff Miles Tolbert, the individual who verified the interrogatory responses under oath on behalf of Plaintiffs, had a basis for making that verification. See Shepherd v. ABC, Inc., 62 F.3d 1469, 1482 (D.C. Cir. 1995) ("Of course, the representative must have a basis for signing the responses and for thereby stating on behalf of the corporation that the responses are accurate.").

If the basis on which Secretary Tolbert relied was incorrect and his sworn verification was therefore false, the Cargill Defendants are entitled to discovery into the reasons for that false statement for at least two reasons. First, such an error calls into question the accuracy and completeness of Plaintiffs' other discovery responses; if Plaintiffs or their can make such a fundamental mistake in responding to multiple interrogatories, they could just as easily mistaken the substance of other discovery responses or overlooked other relevant information. Second, the false statement calls into question Plaintiffs' credibility generally and, depending on the evidence offered at trial, could be used to impeach Plaintiffs' on any of a number of points. The Cargill Defendants are entitled to at least explore these issues in the context of a deposition.

On the other hand, if the basis on which Secretary Tolbert relied was correct and his sworn verification was true (contrary to Plaintiffs' attorney's later statements), then the

documents that Plaintiffs produced do in fact contain information responsive to the Cargill Defendants' interrogatories and relevant to the issues in Plaintiffs' claims. Plaintiffs cannot reasonably dispute that the Cargill Defendants are entitled to inquire into the existence, location, and substance of such information.

By making the required sworn verification of their answers to the Cargill Defendants' interrogatories, Plaintiffs necessarily created one or more witnesses to the truth of the verification. See Saria v. Mass. Mut. Life Ins. Co., 228 F.R.D. 536, 538-39 ( S.D. W. Va. 2005) (noting that interrogatory responses "are nothing short of testimony" and that, if an attorney signed responses, "the attorney has effectively been made a witness."). The Cargill Defendants do not specifically ask to depose the actual signer Secretary Tolbert on these issues; they recognize that in the present context, Plaintiffs must necessarily rely on others to provide and verify the bases of the interrogatory responses. It is those persons, who have first hand information of the sources and substance of Plaintiffs' information, that the Cargill Defendants wish to depose.

Inasmuch as Plaintiffs have objected to a proposed deposition on the interrogatory verification issue, the Cargill Defendants request that as an additional sanction for Plaintiffs' violation of this Court's Orders, the Court direct Plaintiffs to submit to the attached proposed Notice within 30 days and without objection. The Cargill Defendants should not have to file yet another motion to compel to force Plaintiffs to put up a deponent on this narrow issue. The Court should require Plaintiffs to submit to the proposed Notice.

### **III. Conclusion.**

As addressed in the briefing on the underlying motion for sanctions, this Court has broad discretion in issuing Rule 37 sanctions. The Cargill Defendants respectfully request that the

Court use this power to sanction Plaintiffs \$1000 for their admitted misuse of Rule 33(d), and to compel the proposed Rule 30(b)(6) deposition of the person or persons most knowledgeable about Plaintiffs' verification of their original interrogatory responses containing the Rule 33(d) references.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 4th day of December, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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